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RHB Bank Bhd v PLB Land Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(NCvC)(A)-2420–12 OF 2021
YAACOB SAM, GUNALAN MUNIANDY AND AZIMAH OMAR JJCA
2 OCTOBER 2023

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Land Law — Rights and title — Recovery of — Appellant claimed to recover property — High Court dismissed appellant's originating summons — Whether it was appropriate for High Court to dismiss originating summons on basis of privity of contract — Whether it was appropriate for High Court to deny appellant's beneficial interest as assignee merely because loan disbursement cum full purchase price was not paid to developer — Whether it was appropriate for High Court to prefer respondent's legal rights over appellant's beneficial rights over subject property

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A sale and purchase agreement ('the SPA') was entered between one Tong Ah Ee ('TAE') and Majestic Heights Sdn Bhd ('MHSB') in which TAE purchased one commercial unit ('the subject property') from MHSB within a property development ('the abandoned project'). Under the SPA, it was agreed that time was of the essence and that the subject property shall be delivered to TAE by 23 September 1998. To finance the purchase under the SPA, TAE had obtained a loan from the appellant ie RHB Bank Bhd ('RHB'). The loan was granted in consideration of TAE assigning his interest to RHB. MHSB abandoned the abandoned project and was unable to deliver vacant possession ('VP') as per the terms of the SPA. Three years after the lapsing of the VP delivery deadline, MHSB was compulsorily wound up by the court on 16 October 2001. The second and third defendants were then appointed as liquidators for MHSB ('the liquidators'). There was no movement at all regarding the abandoned project since then. Neither MHSB nor RHB (as assignee) initiated any claim or action for either recovery of the subject property or for reparations in view of MHSB's breach of the SPA. About 16 years after MHSB's failure to deliver VP of the subject property to RHB or TAE, the liquidators sold the entirety of the abandoned project to the respondent ie PLB Land Sdn Bhd ('PLB') circa 2014. PLB succeeded to complete the formerly abandoned project. RHB suddenly, after 20 years, since MHSB's failure to deliver VP, now prosecuted its 'rights' as assignee and auctioned off the subject property. Via the auction, one Ham Hon Meng ('HHM') emerged as the successful bidder to purchase the subject property from RHB. In view of honouring the sale to HHM, RHB filed the originating summon ('OS') against the respondent and liquidators before the High Court to safeguard its interest as assignee and beneficial owner of the subject property. It was the appellant's core contention that it was wrong for the liquidators to sell off the development (including the subject property) as

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A though it was an unencumbered property. The learned judge had dismissed RHB's OS and hence, this appeal.

Held, dismissing the appeal with costs:

B (1) The present case revolved around the competing legal interest between two purchasers of the same one subject property from a singular vendor (being MHSB). In such instance of competing interest, *res ipsa loquitur* there would not be any contractual privity between the two competing purchasers. Privity of contract was not relevant in determining the C manner of priority the law may determine the competing purchasers' entitlements and rights. Therefore, it was wrong for the learned judge to dismiss the OS on the grounds of privity of contract (or lack thereof) (see paras 12–14).

D (2) It would be gravely unjust if it was to hold RHB to be at fault for not fully disbursing the loan when the non-payment was caused by MHSB's own failure to fulfil its end of the bargain and complete the development of the abandoned project. Thus, a purchaser would not lose beneficial interest just because the developer failed to complete the development so as to be E contractually entitled to the full payment for a particular property. It was indeed inappropriate for the learned judge to deny RHB's beneficial interest as assignee merely because the loan amount cum full purchase price could not be disbursed to MHSB due to MHSB's failure to complete the development of the abandoned project (see paras 21–23).

F (3) An action claiming for transfer of the subject property or to claim for vacant possession of the subject property was an action in rem to recover land and not an action in personam to claim for liquidated ascertained damages ('LAD') under a contract. What RHB was seeking vide its OS was not for LAD, but to recover its rights and title over the subject G property. RHB or TAE may be allowed to 'wait' on its in personam rights for LAD but the law would not allow the subject property to be kept in a stalemate or state of limbo for an inordinately long period of time. Thus, an action in rem for the title and possession of the subject property must still adhere to the prescribed limitation period of 12 years under H s 9(1) of the Limitation Act 1953. The accrual of such cause of action for possession or title of the subject property must necessarily accrue at the earliest instance of breach when RHB or TAE's rights for possession or title over the subject property was denied. RHB's rights as assignee and TAE's rights as assignor was first clearly infringed as soon as MHSB was I unable to deliver VP as per the time stipulated under the SPA. Thus, the first instance of contractual breach, and deprivation of proprietary right had already occurred when VP was not delivered within time. It would also remain that RHB's claim in personam under the SPA would also be time barred as more than six years had passed since the last date to deliver

VP under the SPA. Therefore, RHB's claim would be time barred in both fronts of a claim in rem over the subject property (as more than 12 years had passed since the last date to deliver VP) and a claim in personam under the SPA (as more than six years had passed since the last date to deliver VP). It was just and appropriate for the learned judge to prefer PLB's rights over RHB's beneficial rights over the subject property. By statutory law, RHB's claim was accordingly barred by limitation and by equity, the doctrine of laches would bar RHB from going against its prior 20 years' worth of inaction to prosecute its interest as assignee (see paras 32–33, 40, 42, 46–47 & 49).

[Bahasa Malaysia summary

Satu perjanjian jual beli ('PJB') telah dimeterai antara seorang Tong Ah Ee ('TAE') dan Majestic Heights Sdn Bhd ('MHSB') di mana TAE membeli satu unit komersial ('hartanah') daripada MHSB dalam pembangunan hartanah ('projek terbengkalai'). Di bawah PJB, telah dipersetujui bahawa masa adalah penting dan bahawa hartanah akan diserahkan kepada TAE selewat-lewatnya pada 23 September 1998. Untuk membiayai pembelian di bawah PJB, TAE telah mendapatkan pinjaman daripada perayu iaitu RHB Bank Bhd ('RHB'). Pinjaman itu diberikan sebagai balasan TAE menyerahkan kepentingannya kepada RHB. MHSB telah meninggalkan projek terbengkalai dan tidak dapat menyerahkan milikan kosong ('MK') mengikut syarat PJB. Tiga tahun selepas tarikh akhir penghantaran MK luput, MHSB telah digulung secara wajib oleh mahkamah pada 16 Oktober 2001. Defendan kedua dan ketiga kemudiannya dilantik sebagai pelikuidasi untuk MHSB ('pelikuidasi'). Tiada pergerakan langsung mengenai projek terbengkalai sejak itu. Baik MHSB mahupun RHB (sebagai pemegang serah hak) tidak memulakan sebarang tuntutan atau tindakan sama ada untuk mendapatkan semula hartanah atau untuk pampasan memandangkan pelanggaran MHSB terhadap PJB. Kira-kira 16 tahun selepas kegagalan MHSB menyerahkan MK hartanah kepada RHB atau TAE, pelikuidasi menjual keseluruhan projek terbengkalai kepada responden iaitu PLB Land Sdn Bhd ('PLB') sekitar 2014. PLB berjaya menyiapkan projek yang sebelum ini terbengkalai. RHB tiba-tiba, selepas 20 tahun, sejak kegagalan MHSB menyerahkan MK, kini mendakwa 'haknya' sebagai pemegang serah hak dan melelong hartanah. Melalui lelongan itu, seorang Ham Hon Meng ('HHM') muncul sebagai pembida yang berjaya untuk membeli hartanah tersebut daripada RHB. Untuk menghormati penjualan kepada HHM, RHB memfailkan saman pemula ('SP') terhadap responden dan pelikuidasi di hadapan Mahkamah Tinggi untuk melindungi kepentingannya sebagai pemegang serah hak dan pemilik benefisial hartanah. Adalah menjadi pertikaian utama perayu bahawa adalah salah bagi pelikuidasi untuk menjual pembangunan (termasuk hartanah) seolah-olah ia adalah hartanah tanpa halangan. Hakim yang bijaksana telah menolak SP RHB dan oleh itu, rayuan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Kes ini berkisar tentang kepentingan undang-undang yang bersaing antara dua pembeli satu hartanah yang sama daripada vendor tunggal (iaitu MHSB). Dalam contoh kepentingan bersaing sedemikian, *res ipsa loquitur* tidak akan ada sebarang priviti kontrak antara dua pembeli yang bersaing. Priviti kontrak tidak relevan dalam menentukan cara keutamaan undang-undang menentukan kelayakan dan hak pembeli yang bersaing. Oleh itu, adalah salah bagi hakim yang bijaksana untuk menolak SP atas alasan priviti kontrak (atau kekurangannya) (lihat perenggan 12–14).

(2) Amatlah tidak adil jika diputuskan RHB bersalah kerana tidak mengeluarkan pinjaman sepenuhnya apabila kegagalan pembayaran itu disebabkan oleh kegagalan MHSB sendiri untuk memenuhi perjanjian itu dan menyelesaikan pembangunan projek terbengkalai. Oleh itu, pembeli tidak akan kehilangan kepentingan benefisial hanya kerana pemaju gagal menyiapkan pembangunan supaya berhak secara kontrak untuk bayaran penuh untuk hartanah tertentu. Adalah tidak wajar bagi hakim yang bijaksana untuk menafikan kepentingan benefisial RHB sebagai pemegang serah hak semata-mata kerana jumlah pinjaman dan harga pembelian penuh tidak dapat diagihkan kepada MHSB kerana kegagalan MHSB menyiapkan pembangunan projek terbengkalai (lihat perenggan 21–23).

(3) Satu tindakan menuntut pemindahan hartanah atau menuntut milikan kosong hartanah adalah tindakan in rem untuk mendapatkan semula tanah dan bukan tindakan in personam untuk menuntut ganti rugi tertentu dan ditetapkan ('GRT') di bawah kontrak. Apa yang dipohon oleh RHB melalui SP bukan untuk GRT, tetapi untuk mendapatkan semula hak dan hak miliknya ke atas hartanah. RHB atau TAE mungkin dibenarkan untuk 'menunggu' hak peribadinya untuk GRT tetapi undang-undang tidak membenarkan hartanah disimpan dalam kebuntuan atau keadaan dibiarkan tanpa jawapan untuk tempoh masa yang sangat lama. Oleh itu, tindakan in rem untuk hak milik dan milikan hartanah masih perlu mematuhi tempoh had yang ditetapkan selama 12 tahun di bawah s 9(1) Akta Had 1953. Keakruan kausa tindakan untuk milikan atau hak milik hartanah mestilah terakru pada kejadian pelanggaran yang paling awal apabila hak RHB atau TAE untuk milikan atau hak milik ke atas hartanah telah dinafikan. Hak RHB sebagai pemegang serah hak dan hak TAE sebagai penyerah hak mula-mula jelas dilanggar sebaik sahaja MHSB tidak dapat menyerahkan MK mengikut masa yang ditetapkan di bawah PJB. Oleh itu, keadaan pertama pelanggaran kontrak, dan pelucutan hak proprietari telah berlaku apabila MK tidak diserahkan dalam masa. Ia juga kekal bahawa tuntutan RHB in personam di bawah PJB juga akan disekat masa kerana lebih daripada

enam tahun telah berlalu sejak tarikh terakhir untuk menyerahkan MK di bawah PJB. Oleh itu, tuntutan RHB akan dihalang masa dalam kedua-dua bahagian tuntutan in rem ke atas hartanah (kerana lebih daripada 12 tahun telah berlalu sejak tarikh terakhir untuk menyerahkan MK) dan tuntutan in personam di bawah PJB (kerana lebih daripada enam tahun telah berlalu sejak tarikh terakhir untuk menyerahkan MK). Adalah adil dan wajar bagi hakim yang bijaksana untuk mengutamakan hak PLB daripada hak benefisial RHB terhadap hartanah. Mengikut undang-undang berkanun, tuntutan RHB dengan sewajarnya dihalang oleh had masa dan oleh ekuiti, doktrin laches akan menghalang RHB daripada menentang ketiadaan tindakannya selama 20 tahun sebelum ini untuk mendakwa kepentingannya sebagai pemegang serah hak (lihat perenggan 32–33, 40, 42, 46–47 & 49).]

Cases referred to

Chong Chee Piao & Ors v Koh Wah Leong (sebagai Pengerusi Pertubuhan Penganut-Penganut Ting Leong Keng Lee Hu Tong Chu, Pantai Remis, Manjong, Perak) [2017] MLJU 2454, HC (refd)

Filati Lastex Elastofibre (M) Sdn Bhd v Nikseng Development Sdn Bhd [2009] 8 MLJ 374, HC (refd)

Lim Meow Khean & Ors v Pakatan Mawar (M) Sdn Bhd (in liquidation) & Ors [2021] MLJU 127, CA (not folld)

Nasri v Mesah [1971] 1 MLJ 32, FC (folld)

Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd [1999] 3 MLJ 489, CA (refd)

Tan Ong Ban v Teoh Kim Heng [2016] 3 MLJ 23, FC (distd)

Veeriyah a/l Gothandabani v Majestic Heights Sdn Bhd (in liquidation) & Ors [2017] MLJU 1148, HC (refd)

Vignesh Naidu a/l Kuppusamy Naidu v Prema Bonanza Sdn Bhd and another appeal [2023] MLJU 277, CA (refd)

Legislation referred to

Contracts Act 1950 ss 57, 57(2), 66
Limitation Act 1953 ss 6(1), 9(1)

Appeal from: Originating Summons No PA-24NCvC-122–02 of 2019 (High Court, Pulau Pinang)

Lim Poh Leong (with Lean Jie) (Gibb & Co) for the appellant
Vaasudevan a/l Puspagaran (Yoges & Co) for the respondent.

Azimah Omar JCA:

BACKGROUND FACTS

[1] The appeal before us is a case of competing legal interest over a property between a white knight company, PLB Land Sdn Bhd ('PLB') who circa 2014 had purchased an entire abandoned property development project (subject property included) from a developer in liquidation, Majestic Heights Sdn Bhd ('MHSB') and a financier cum assignee, RHB Bank Bhd ('RHB/appellant') who was assigned the rights over the subject property circa 1998 by the subject property's purchaser, one Tong Ah Ee ('TAE') and in 2018 the appellant subsequently sold the subject property by way of auction to a successful bidder one Ham Hon Meng ('HHM').

[2] It was undisputed that the development project was long abandoned circa 1998. It was also undisputed and admitted that neither TAE nor RHB had ever paid the full purchase price for the subject property to MHSB at any given time. PLB as white knight had purchased, rehabilitated, and successfully completed the formerly abandoned project and now seeks to maintain proprietary interest over the subject property. After two decades of inaction since 1998, RHB suddenly in 2018 (capitalising on the white knight's completion of the project) proceeded to auction off the subject property to HHM on the pretense that RHB's rights as assignee had never been extinguished despite the development project being abandoned for 20 years before the impugned auction and sale to HHM. It was the appellant's core contention that it was wrong for MHSB's liquidators to sell off the development (including the subject property) as though it was an unencumbered property.

[3] The facts began with the entry of the sale and purchase agreement between TAE and MHSB on 23 September 1995 ('the SPA') in which TAE purchased one commercial unit ('subject property') from MHSB within a property development known as Phase 2A, Taman Terubong Indah ('the abandoned project'). Under the SPA, it was agreed that time was of the essence and that the subject property shall be delivered to TAE (or RHB as assignee) by 23 September 1998 (36 calendar months from SPA date) (cl 22 of the SPA).

[4] To finance the purchase under the SPA, TAE had obtained a loan from RHB. The loan was granted in consideration of TAE assigning his interest to RHB on 4 March 1998 ('loan agreement and assignment'). Peculiarly, this loan agreement and assignment came about just less than 20 days before the contractual deadline for vacant posession ('VP') delivery.

[5] In any case, MHSB abandoned the abandoned project and was unable to deliver VP as per the terms of the SPA. In other words, both TAE as assignor, and RHB as assignee were already deprived of its rights over the subject property since 23 September 1998.

[6] Three years after the lapsing of the VP delivery deadline, MHSB was compulsorily wound up by the court on 16 October 2001. It ensued that the second and third defendants were then appointed as liquidators for MHSB (in liquidation) ('the liquidators').

[7] There was no movement at all regarding the abandoned project since then. Neither MHSB nor RHB (as assignee) initiated any claim or action for either recovery of the subject property or for reparations in view of MHSB's breach of the SPA. About *16 years after MHSB's failure to deliver VP* of the subject property to RHB or TAE, the liquidators sold the entirety of the abandoned project to the white knight company, PLB *circa 2014*. Upon the efforts and at the expense of PLB to rehabilitate the abandoned project, PLB succeeded to complete the formerly abandoned project.

[8] Incidental to PLB's complete rehabilitation of the abandoned project, RHB suddenly (AFTER 20 YEARS) since MHSB's failure to deliver VP, now prosecuted its 'rights' as assignee and auctioned off the subject property on 15 May 2018. Via the auction, Ham Hon Meng ('HHM') emerged as the successful bidder to purchase the subject property from RHB.

[9] In view of honouring the sale to HHM, RHB filed the originating summon before the High Court below to safeguard its interest as assignee and beneficial owner of the subject property. On the contrary, the defendants resisted RHB's claim and insisted that the sale between MHSB (in liquidation) to PLB was valid in law.

DECISION OF THE HIGH COURT

[10] Upon hearing the submissions of all parties, the learned judge had dismissed RHB's originating summons ('OS') in toto. We were made aware of the fact that a grounds of judgment was not available as the learned judge had since retired. Nevertheless, we have perused the notes of evidence to identify the learned judge's reasoning behind dismissing the OS. In essence, the learned judge had dismissed the OS based on the following reasons:

(a) there was no privity of contract between RHB and PLB for RHB to insist its rights against PLB. RHB's cause of action (if any) should be in personam against MHSB (or the liquidators administrating MHSB);

(b) RHB has no rights to claim for beneficial rights over the subject property as RHB has never paid the full purchase price for the subject property. A constructive trust can only arise if the purchaser had paid the full purchase price of the subject property;

(c) RHB's claim to recover the subject property is barred by limitation as more than 12 years have passed since MHSB's breach in failing to deliver title to the subject property either to TAE as assignor or RHB as assignee; and

(d) RHB ought to be estopped from insisting on its entitlement considering the glaring and inexplicable decades' worth of delay in prosecuting its interest over the subject property.

[11] Dissatisfied with the learned judge's decision, RHB filed the present appeal before us. We have analysed and read the learned judge's decision within the notes of evidence and are of the mind that the propriety of the appeal before us can be determined by addressing all of the issues in the separate headings below.

ISSUE 1: WAS IT APPROPRIATE FOR THE LEARNED JUDGE TO DISMISS THE OS ON THE BASIS OF PRIVITY OF CONTRACT (OR LACK THEREOF)?

[12] To our apprehension, since TAE had assigned all his rights under the SPA to RHB, then RHB effectively had stepped into the shoe and position of TAE as the purchaser of the subject property from MHSB. Thus, the present case revolves around the competing legal interest between two purchasers of the same one subject property from a singular vendor (being MHSB). In such instance of competing interest, *res ipsa loquitur* there would not be any contractual privity between the two competing purchasers. Notwithstanding the absence of privity, equity shall still be able to uphold the interest of one purchaser (who had paid full purchase price) to prevail over the interest of the other purchaser (who had not yet paid the full purchase price) (see the Federal Court decision in *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23):

> The principle of *beneficial ownership differentiates between the rights of a purchaser of a property who has fully settled the purchase price with one who has not*. This principle clothed a purchaser who had settled the full purchase price with a distinct privilege equivalent to a legal owner, although he or she had yet to be registered as the proprietor of the property ... (Emphasis added.)

[13] Thus, it is clear that privity of contract is not relevant in determining the manner of priority the law may determine the competing purchasers' entitlements and rights. At best, privity of contract may only become relevant in the context of a parties' rights in personam under the SPA (in that the two

purchasers can only claim for damages under the SPA against the vendor). However, a purchaser's right in rem over the subject property can prevail over the other purchaser regardless of the lack of privity of contract.

[14] All of the above considered in this part, we answer *issue 1 in the NEGATIVE*. Although it was appropriate for the learned judge to dismiss RHB's OS, it was still wrong for the learned judge to dismiss the OS on the grounds of privity of contract (or lack thereof).

ISSUE 2: WAS IT APPROPRIATE FOR THE LEARNED JUDGE TO DENY RHB'S BENEFICIAL INTEREST AS ASSIGNEE MERELY BECAUSE THE LOAN DISBURSEMENT CUM FULL PURCHASE PRICE WAS NOT PAID TO MHSB?

[15] Throughout the notes of evidence, it was apparent that one of the most critical issues discussed during the hearing of the OS was the balancing of beneficial interest between the two purchasers being RHB (as assignee) and the second purchaser, PLB. As we have mentioned above, in the instance that one singular property was sold twice (to different purchasers) by one singular vendor, the law would determine the prevailing rights between the two purchasers on the principle of competing beneficial interests.

[16] Under this principle, equity would lie in favor of the purchaser who had first paid the full purchase price of the property (notwithstanding the fact that his purchase was the subsequent purchase that was later in time). Equity would have it that the purchaser who first settled the purchase price would attain beneficial interest as he had settled all his contractual obligations to lay his claim over the property. On the other hand, the other purchaser who had yet to pay full purchase price would not have a right in rem upon the property as he had yet to settle his contractual obligations. Nonetheless, that purchaser although not having right in rem, he would still have right in personam under the contract to sue for damages for what he had expended in reliance of the SPA. See the Federal Court decision in *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23 ('Tan Ong Ban'):

> Therefore, based on the ordinary sale and purchase transaction, the purchaser would acquire, a right in rem or a right in personam. *Applying the legal principles to the facts of the present case it was clear that the respondent, who had paid the purchase price in full, was the beneficial owner of the property and enjoyed a right in rem over the property, while the appellant, who had not paid the full purchase price of the property, was at best clothed with a right in personam* as against the respondent upon the execution of the first SPA and payment of the sum of RM5,250 to JAS. As such, the appellant's right was purely contractual in nature as against JAS and no cause of action could lie against the respondent, who was a complete stranger to the contract. (Emphasis added.)

[17] It was on this principle that the learned judge had preferred the rights of PLB over RHB. It was admitted and undisputed that the loan (cum full purchase price) was never fully disbursed. If we were to strictly apply the Federal Court's ruling in *Tan Ong Ban*, then the learned judge would be right in preferring PLB's entitlement over RHB's.

[18] Nonetheless, the counsel for the appellant had piqued our interest in their reference to a very recent decision of this court in *Lim Meow Khean & Ors v Pakatan Mawar (M) Sdn Bhd (in liquidation) & Ors* [2021] MLJU 127 (facts and issues of which were very relevant to the present case). In *Lim Meow Khean*, the Court of Appeal had to balance out the interest of purchasers (and their end financiers) of an abandoned development project as against the interest of a third party purchaser (who had purchased the abandoned development project from the original developer (in liquidation).

[19] The Court of Appeal appreciated (and we thoroughly agree) that the equitable principle in *Tan Ong Ban* cannot apply in cases where the non-payment of the full purchase price was first instigated by the prior breach or non-performance of the developer:

> [104] The learned JC also held that since the plaintiffs have not settled the full purchase price they are not beneficial owners of the units purchased by them. *Whilst that may hold true in cases where the purchaser has defaulted in payment of the purchase price, here the situation is quite different*.
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> [117] Learned counsel for D1 and D2 submitted that the plaintiffs are not beneficial owners of the units they bought until they have paid the full purchase price. *However here is a case where the plaintiffs who had taken a loan with their end financiers are able, ready and willing to pay the full purchase price and indeed their banks had undertaken to pay the developer the balance purchaser price* represented in the loan sum against the architect's certification of progress billing for the various stages of construction.
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> [137] It was as good as a done deal and parties were awaiting the developer to complete construction so that the full purchase price may be released but here, alas, the developer itself that failed to deliver the completed factory units and the individual subdivided titles.
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> [139] *It must not be forgotten that the culprit here was the developer who failed to keep its part of the bargain in failing to complete the construction* of the factory units and not that of the purchasers who had their financing in place with some being cash buyers.
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> [140] It is in that context that the purchasers are regarded by the developer as the beneficial owners of the units that they bought for which they were assigning their rights, interest and title to their banks in D2 to D5 for financing.

[141] The Federal Court case of *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23 that decided that a purchaser could only have beneficial ownership in a property upon full payment of purchase price *can thus be distinguished*. (Emphasis added.)

[20] We wholly agree with the Court of Appeal's reasoning as it is also in line with the trite and celebrated principle that none should be allowed to capitalise on or stake a case on its own breach or delinquent conduct (see *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489):

> *there is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application*, it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulated as follows: *a party ought not to be permitted to take advantage if his own breach*. See *Alghussein Establishment v Eton College* [1988] 1 WLR 587; *New Zealand Shipping Co Ltd v Societe Des Ateliers Et Chantiers De France* [1919] AC 1 (see also *Teoh Kok Seng v Heesland Sdn Bhd & Anor* [2023] MLJU 1096).

[21] It would be gravely unjust if we were to hold RHB to be at fault for not fully disbursing the loan when the non-payment was caused by MHSB's own failure to fulfil its end of the bargain and complete the development of the abandoned project.

[22] Thus, we cannot agree that a purchaser would lose beneficial interest just because the developer failed to complete the development so as to be contractually entitled to the full payment for a particular property.

[23] The aforementioned in this part considered, we answer *issue 2 in the NEGATIVE*. It was indeed inappropriate for the learned judge to deny RHB's beneficial interest as assignee merely because the loan amount cum full purchase price could not be disbursed to MHSB due to MHSB's failure to complete the development of the abandoned project.

ISSUE 3: WAS IT APPROPRIATE FOR THE LEARNED JUDGE TO PREFER PLB'S LEGAL RIGHTS OVER RHB'S BENEFICIAL RIGHTS OVER THE SUBJECT PROPERTY?

[24] This is the juncture in which we respectfully depart from the decision in *Lim Meow Khean*. The Court of Appeal in *Lim Meow Khean* was right to excuse the purchaser and financier for not fully paying the purchase price (and thereby maintaining the purchaser and financier's beneficial interest over the property). However, the tide would unfortunately turn against the purchaser and financier when an inexplicably and unconscionably long period of delay passes without any proactive initiative to safeguard and prosecute their beneficial interest over the property.

[25] The critical reason the law would require parties to stay vigilant and not sit on their interest for long periods of time would be that, a long period of inaction and silence can indicate acquiescence and abandonment of an interest (especially in this case where both TAE and RHB had not prosecuted their rights for *20 YEARS* before auctioning off the property *in 2018*). And when there is such a long period of inaction, the law of limitation would set in so as to enable parties to escape the state of limbo and uncertainty and try to make the best out of an unsavory situation.

[26] And when parties have 'moved on' to make the best out of the situation, the initiative to do so would most likely involve a third party who would be able to breathe new life into and revitalise the abandoned project. And when such third party had involved itself in the scenario, it would also be incumbent upon the court to not simply ignore the third party's interest over the subject property (especially when the third party had expended so much to finally complete the abandoned project).

[27] And this was exactly what had transpired in the case before us. The *abandoned project laid dormant for at least 16 years before it was sold off to PLB*. Even after the abandoned project was sold to PLB, *neither TAE nor RHB sought to intervene or safeguard their interest for a further four years*. Only after *20 years* when PLB managed to salvage the project that RHB finally saw it fit to prosecute its right under the assignment. We would surmise that when such a long passage of time had passed without any initiative from either RHB or TAE to safeguard their interest, it was reasonable for PLB to presume that neither RHB nor TAE was interested in the subject property. It was also reasonable for PLB and MHSB (or its liquidators) to presume that the law of limitation might have already set in to bar either RHB's or TAE's interest over the subject property.

[28] We understand that the Court of Appeal in *Lim Meow Khean* had proceeded to decide on the sentiment that the life of the SPA shall remain living when there was no overt or clear act of termination. We are in agreement to this sentiment but only to a limited extent. Of course no party or even the court can simply assume a termination of a contract unless there was clear intention and evidence of the intent to terminate any given contract. However, this rule must also adhere and respect other salient principles of civil law and contract.

[29] It is equally pertinent and critical that any party should not be indolent and sleep on his rights. Even before equity steps in, the statutory law of limitation would set in to enable interested parties to liberated out of the state of limbo and uncertainty.

[30] Now, the Court of Appeal in *Lim Meow Khean* held that in the instance

of a development with a clause for liquidated ascertained damages ('LAD') for late delivery of VP, the cause of action for the purchaser does not accrue from the last date to deliver VP as it was already contractually anticipated that the purchaser can accept VP at a much later date and later claim for LAD:

> [212] The plaintiffs/purchasers had not terminated the SPAs and as there is a clause of late delivery, they are entitled to wait for the developer to complete the construction at a much later date and claim the agreed liquidated damages for late delivery provided for in cl 11(D) of the SPA.

[31] On this sentiment, the Court of Appeal concluded that the cause of action shall accrue at the time when the developer indicated its intention to no longer abide by the terms of the SPA:

> [235] Therefore it is clear that the cause of action of the plaintiffs/purchasers arose when D1 and D2 evinced an intention not to be bound by their various undertakings given when the master titles were transferred to a third party in PDG Development Sdn Bhd sometime on 29 July 2015.

[32] However, we respectfully have to depart from the Court of Appeal's reasoning in *Lim Meow Khean*. The first reason being that an action claiming for transfer of the subject property (or to claim for vacant possession of the subject property IS AN ACTION IN REM TO RECOVER LAND and NOT AN ACTION IN PERSONAM TO CLAIM FOR LAD UNDER A CONTRACT (see *Filati Lastex Elastofibre (M) Sdn Bhd v Nikseng Development Sdn Bhd* [2009] 8 MLJ 374):

> I am in agreement with the plaintiff's counsel's submission that s 9 of the Act applies in the instant case. *This is an action to recover land namely the green portion arising from the exercise of the option by the plaintiff and the limitation period is 12 years from the date on which the right accrued*. The case of *Nasri v Mesah* [1971] 1 MLJ 32 relied upon by the plaintiff's counsel is clear authority on that point. *In that case, the Federal Court held that an action for specific performance of an agreement for the sale of land or for a declaration of title to land is essentially an action to recover land*.

[33] Of course we are indeed aware that it is trite law that in cases claiming for LAD, the cause of action would accrue only when VP was delivered to the purchaser (see Court of Appeal in *Vignesh Naidu a/l Kuppusamy Naidu v Prema Bonanza Sdn Bhd and another appeal* [2023] MLJU 277). However, what RHB is seeking vide its OS was not for LAD, but to recover its rights and title over the subject property.

[34] Following our earlier statement, there is critical mischief that the law seeks to curb under s 9(1) of the Limitation Act. As land would innately hold 'sentimental' value, the law acknowledges that an interested party should be given much more time (beyond the normal six years' limitation of a contractual claim) to safeguard its interest in the land. And that 'additional' period of time

is *12 years* from the accrual of the cause of action in rem over the property.

[35] Thus, the law had statutorily prescribed that it would be undesirable that a land be left in limbo and uncertainty for more than 12 years, what more for a whopping 20 years like in the case before us.

[36] Although we sympathise with the plight of the purchasers of the abandoned development, RHB's and TAE's inordinate delay had given room and opportunity for PLB to rehabilitate the abandoned project in earnest. Thus, since RHB and TAE had not for so long prosecute their interest, it would equally be unjust for us to disregard PLB's interest who had acted in response to RHB's and TAE's two decades' worth of radio silence.

[37] Equity and the doctrine of laches would set in even against a registered proprietor (except in cases of illegal tort of trespass) for the registered proprietor's inordinate delay of 20 years to prosecute and defend his interest (see *Chong Chee Piao & Ors v Koh Wah Leong (sebagai Pengerusi Pertubuhan Penganut-Penganut Ting Leong Keng Lee Hu Tong Chu, Pantai Remis, Manjong, Perak)* [2017] MLJU 2454):

> [28] It is appropriate at this juncture to look at the contentions of the defendant in deciding whether triable issues in law and in fact had been raised. The defendant contended that, inter alia, the following:
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> ...
>
> (d) *there was inordinate delay under the doctrine of laches in instituting the case after a time lapse of 20 years from the time the plaintiffs became the registered owners of the land.*
>
> ...
>
> [43] The defendant argued that there was an inordinate delay under the doctrine of laches in the institution of this claim. While it is true that the plaintiffs through their solicitors did send a letter dated 22nd August of 1999 to the defendant complaining that the defendant 'had been operating a temple on the above land' and had also 'not been paying any rentals' to the plaintiffs, the plaintiffs did not pursue the matter.
>
> [44] *By not pursuing the matter after the 1999 letter, the conduct of the plaintiffs could be inferred to mean that they had desisted from taking any further action against the defendant*. Furthermore, no cogent explanation has been put forward by the plaintiffs to explain the delay of twenty years since the land was registered under their name.
>
> [45] It is perhaps pertinent to quote at this juncture what Edgar Joseph Jr J (as His Lordship then was) said in the case of *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p 237; [1989] 1 CLJ 693; [1989] 1 CLJ Rep 219 at p 276 on the doctrine of laches. The relevant portion of the judgment can be related to the facts of the present case. He described the doctrine as follows:
>
> ... Laches is an equitable defence implying lapse of time and delay in prosecuting

> a claim. A Court of Equity refuses its aid to a stale demand where the plaintiffs has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such delay as to amount to laches the court considers whether there has been acquiescence on the plaintiffs's part and any change of position that has occurred on the part of the defendant.
>
> The doctrine of laches rests on the consideration that it is unjust to give a plaintiffs a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted.
>
> (*Halsbury's Laws of England* (3rd Ed) Vol 14 p 641 paras 1181–1182). Laches has been succinctly described as 'inaction with one's eyes open. (Emphasis added.)

[38] On the matter of the accrual of RHB's cause of action, RHB argued that the accrual was postponed until circa 2018 when MHSB or its liquidators evinced its intention to not abide by the SPA. On the contrary, PLB argued that the cause of action accrues from the first instance of breach of failing to deliver VP as per the deadline under the SPA.

[39] RHB again relied upon the case of *Lim Meow Khean* to support its argument on the accrual of cause of action. However, as we have intimated above, we are unable to follow *Lim Meow Khean*'s reasoning as the accrual of a cause of action in rem to recover land, cannot be equated to the accrual of cause of action as in a claim in personam for LAD. Indeed, we can agree that the accrual can be postponed in an in personam claim for LAD as the SPA had provided a mechanism to allow as such. However, the same mechanism cannot be applied carte blanche to other natures of claim or cause of action to the extent that it would defeat the SPA's mutual agreement that time is of the essence.

[40] Succinctly, RHB or TAE may be allowed to 'wait' on its in personam rights for LAD but the law would not allow the subject property to be kept in a stalemate or state of limbo for an inordinately long period of time. Thus, an action in rem for the title and possession of the subject property must still adhere to the prescribed limitation period under s 9(1) of the Limitation Act 1953. Therefore, the accrual of such cause of action for possession or title of the subject property must necessarily accrue at the earliest instance of breach when RHB or TAE's rights for possession or title over the subject property was denied (that time being, the first instance of failure to deliver VP as per the terms of the SPA).

[41] We agree with PLB's reference to the celebrated Federal Court decision

in *Nasri v Mesah* [1971] 1 MLJ 32 on the general principle as to the accrual of cause of action in that although various events may raise a plethora of causes of action, a cause of action under contract would still accrue from the earliest instance of breach or contravention of a contract:

> A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v Brown* (1888) 22 QBD 128 at p 131). In *Reeves v Butcher* [1891] 2 QB 590 at p 511 Lindley LJ said:
>
> This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland* (1843) 4 QB 519, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. *The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought*.
>
> In *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610 at p 617. Viscount Dunedin described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field J in *Gibbs v Guild* 8 QBD 296 302). *In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement* (see *Bolo*'s case LR 57 IA 74). It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run.

[42] We cannot agree with the reasoning in *Lim Meow Khean* that the point in time that RHB's right was infringed can be postponed until 2018 when MHSB or its liquidators refuse to acknowledge the auction by RHB. RHB's rights as assignee and TAE's rights as assignor was first clearly infringed as soon as MHSB was unable to deliver VP as per the time stipulated under the SPA. Thus, the first instance of contractual breach, and deprivation of proprietary right had already occurred when VP was not delivered within time.

[43] Furthermore, it would be legally and factually illogical for us to find that RHB and TAE's rights were not in any real threat of infringement when it was readily admitted that the abandoned project was abandoned since 1998. In fact, even if we were to postpone the accrual of the cause of action, the latest threat of infringement would be the time when MHSB was wound up circa 2000. The abandonment of the development works in 1998 and the subsequent winding up of MHSB (as former developer) were glaring threats that RHB's or TAE's interest over the subject property were at risk of deprivation and infringement. By this time, it would have been abundantly

obvious that MHSB was no longer in any position to confer proprietary rights over the subject property to TAE or RHB.

[44] The counsel for the respondent had rightfully referred to a precedent which was verily identical as it involved the same abandoned project and developer (MHSB) in the case before us. Lim Chong Fong J (now JCA) in the case of *Veeriyah a/l Gothandabani v Majestic Heights Sdn Bhd (in liquidation) & Ors* [2017] MLJU 1148 had held that the purchaser's cause of action to claim proprietary rights over the property accrues from the first instance when MHSB failed to deliver VP within the deadline prescribed under the SPA:

> [31] The accrual of the cause of action especially for breach of contract has been explained by the Federal Court in *Nasri v Mesah* ...
>
> ...
>
> *As for the second defendant and third defendant for recovery of vacant possession of the property, limitation set in on 22 September 2010 that is to say 12 years from 23 September 1998 when vacant possession ought to have been obtained by the plaintiff* assuming that there was even an actionable cause of action against both of them by the plaintiff in the first instance.

[45] In fact, Lim Chong Fong J (now JCA) went as far as to find that the insolvency of MHSB would become a *novus actus interveniens* that would deem the SPA between MHSB and the purchaser to be impossible to be performed and thus the SPA subsequently becomes void (by impossibility) under s 57 of the Contracts Act 1965. And the remainder remedy for instances where a contract subsequently becomes impossible to be performed, is to claim for damages in personam under s 66 of the Contracts Act 1965. Consequence of which the purchaser's cause of action can only be for damages in personam under the SPA. Thus, the applicable limitation period would be *six years* under s 6(1) of the Limitation Act 1953:

> [28] Subsequently by the reason of the court order made on 16 October 2001, the First Defendant was compulsorily wound up and put into liquidation. *The performance of the SPA thus became impossible because of this supervening event*.
>
> ...
>
> The resultant legal consequence is as set out in s 57(2) of the Contracts Act 1950 which reads:
>
> > 57 Agreement to do impossible act
> >
> > Contract to do act afterwards becoming impossible or unlawful
> >
> > (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
>
> Accordingly, the plaintiff would only be compensated following s 66 of the Contracts Act 1950 which reads:

> 66 Consequence of person who has received advantage under void agreement, or contract that becomes void
>
> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.
>
> ...
>
> *In the premises, the plaintiff's cause of action for breach of contract for damages against the first defendant expired on 22 September 2004 that is to say six years from 23 September 1998* or alternatively expired on 15 October 2007 being the latest that is to say 6 years from 16 October 2001 for restitution. (Emphasis added.)

(See also *Pakatan Mawar (M) Sdn Bhd (Dalam Likuidasi) v Nurul 'Akhmar Mohd Shafiee & 7 Yang Lain* [2013] 1 LNS 1031.)

[46] Thus, even if assuming we were wrong in finding that RHB's claim was a claim in rem to recover the subject property, it would inevitably remain that RHB's claim in personam under the SPA would also be time barred as more than six years have passed since the last date to deliver VP under the SPA.

[47] Therefore, no matter how RHB may turn the stone, RHB's claim would be time barred in both fronts of a claim in rem over the subject property (as more than 12 years have passed since the last date to deliver VP) and a claim in personam under the SPA (as more than six years have passed since the last date to deliver VP).

[48] In any case, since RHB was intent on claiming proprietary rights in rem over the subject property, RHB should have at least abide by the limitation period of 12 years under s 9(1) of the Limitation Act 1953 (which RHB clearly had failed to do so).

[49] All the above in this part considered, we answer *issue 3 in the POSITIVE*. It was just and appropriate for the learned judge to prefer PLB's rights over RHB's beneficial rights over the subject property. By statutory law, RHB's claim is accordingly barred by limitation and by equity, the doctrine of laches would bar RHB from going against its prior 20 years' worth of inaction to prosecute its interest as assignee.

OUR DECISION

[50] Although we had answered issues 1 and 2 in the negative, it does not at all entail that the learned judge was wrong in dismissing RHB's OS. Indeed, we do find that the learned judge was in error in determining the OS on the basis

of privity of contract and was also in error in denying RHB's beneficial rights on the supposed reason that RHB had failed to disburse the loan (full purchase price) to MHSB.

[51] Nonetheless, our negative answers in issues 1 and 2 would have to bend to the final determination of our positive answer in issue 3. Even if the learned judge had incorrectly denied RHB's beneficial interest, the learned judge was still correct to find that RHB's beneficial interest was already barred by statutory time limitation and by operation of equity. Thus, we hereby find that although RHB might have had beneficial interest over the subject property (notwithstanding absence of privity of contract, or its failure to disburse the full purchase prince amount to MHSB), RHB's beneficial interest would be defeated by RHB's own 20 years' worth of indolence and failure to prosecute its rights over the subject property. More than six years have passed for RHB to claim for any damages in personam under the SPA against MHSB and more than 12 years have passed for RHB to claim for proprietary rights in rem over the subject property from PLB, MHSB or its liquidators.

[52] Thus, although we have found that the learned judge had academically erred in his decision (in issues 1 and 2), it still firmly stood that his final decision to dismiss RHB's OS on the grounds of time limitation and the equitable doctrine of laches was ultimately correct.

[53] In the result, the appellant/RHB's appeal is dismissed with costs. The decision of the High Court is affirmed. Accordingly, we order the appellant to pay costs of RM15,000 to the respondent subject to allocator.

Appeal dismissed with costs.

Reported by Nabilah Syahida Abdullah Salleh